



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: BRC Associates, Inc.

File: B-237156

Date: February 2, 1990

Charlotte F. Rothenberg, Esq., Reed Smith Shaw & McClay, for the protester.
Donald P. Young, Esq., Saul, Ewing, Remick & Saul, for the interested party, Computer Dynamics, Inc.
Robert W. Kelly, Esq., Office of General Counsel, Executive Office of the President, for the agency.
Paul Jordan, Esq., Paul Lieberman, Esq., John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest allegations that agency improperly reopened discussions, and obtained new best and final offers (BAFOs) constituting an auction, are untimely when filed after award.
2. Agency's verbal relaxation of requirement to submit resumes for awardee without advising protester of change does not require that negotiations be reopened where, due to awardee's higher technical score and lower price, award decision would remain the same.
3. Where solicitation advises offerors of the total points available for each evaluation factor but also advises that subfactors would not be assigned points, agency reasonably evaluated each member of offerors' proposed staffs, consistent with stated evaluation criteria, by using a position functions matrix to produce a percentage of the total possible points for the staffing technical factor.

DECISION

BRC Associates, Inc., protests the award of a cost-plus-fixed-fee contract to Computer Dynamics, Inc. (CDI), under request for proposals (RFP) No. EOPOA-88-55, issued by the Executive Office of the President. BRC alleges several protest grounds, including the agency's failure to apply

047673/140559

the RFP's requirement for staff resumes to all offerors, thereby failing to treat all offerors equally.

We deny the protest.

This solicitation is for the provision of computer facilities management and operational support for the Office of the United States Trade Representative.^{1/} The RFP called for separate technical and cost proposals detailing the proposed level of effort and labor rates. Section M of the RFP provided that technical proposals would be evaluated in three areas worth 60 percent of the evaluation as follows:

- | | | |
|------|---|------------|
| I. | Overall Understanding, Technical Workplan, Management Plan, Phase-in Plan | 400 points |
| II. | Staffing | 450 points |
| III. | Corporate Capabilities | 150 points |

Various subfactors were not listed in order of importance and did not have points assigned. Cost proposals, worth 40 percent of the evaluation, were to be evaluated for accuracy, realism, reasonableness, and affordability, and were to receive a cost score.

With regard to "staffing," offerors were advised that "all staff are key staff" and that proposals "shall include resumes for all staff being offered." Offerors also were required to indicate the position for which each staff member was proposed, and provide evidence of availability and commitment. Among the subfactors listed for the staffing factor was that staff meet or exceed the suggested experience and education guidelines included in the personnel qualifications guidelines section of the RFP. Award was to be based upon an integrated assessment of the evaluation results based on the evaluation factors and relative order of importance. Award could be made to other than the offeror with the lowest price or the highest technical evaluation score.

Three offerors, including CDI and BRC, the incumbent, submitted proposals by the closing date of March 6, 1989. Proposals were evaluated; discussions were conducted with all offerors; and best and final offers (BAFOs) were

^{1/} A separate and discrete section of the solicitation was for office automation and systems development, but BRC did not submit a proposal for this function.

requested by June 9. In late July, after evaluating the BAFOs, the agency sought clarifications from the offerors and discovered that both CDI and BRC intended to substitute certain staff members.^{2/} The contracting officer noted that since all staff were key, changes in personnel could materially affect the evaluation of the contractors. Even though post-award substitutions were allowed by the RFP, the contracting officer believed that he was prohibited from awarding a contract where he was aware of offerors' plans to substitute personnel proposed in their BAFOs. Relying on the decision in Electronic Data Sys. Federal Corp., GSBGA No. 9869-P, 89-2 BCA ¶ 21,655 (Mar. 1, 1989), the contracting officer determined to reopen discussions with BCR and CDI, the only offerors in the competitive range.

At the agency's request, BRC and CDI submitted revised proposals on August 14, 1989. With its August 14 proposal, CDI noted that, pursuant to a telephone conversation with the agency on August 10, it was only submitting a position description for its facilities operators, instead of resumes, and promised that all operators would meet or exceed that description. Conversely, BRC submitted resumes for these positions. For evaluation purposes, the agency scored the position description for CDI, and combined some of the BRC resumes for a single score.

As to staffing, BRC's final evaluation score was 10 points higher than CDI's, but its overall, combined technical score of 629.6 points was 105.5 points lower than CDI's score of 735.1 points. On August 21, both offerors were advised that their costs were too high with BRC at \$2,101,218.11 and CDI at \$1,914,523.80. The agency requested BAFOs by August 25. Under the BAFOs, CDI was lower in cost at \$1,842,487 than BRC at \$1,911,403.51, a difference of \$68,916.51. In view of CDI's higher technical score and lower cost, the agency awarded it the contract on September 6, 1989. After receiving a debriefing on September 13, BRC filed a protest with the agency raising a number of grounds. The agency denied that protest on September 21, and BRC then filed its protest with our Office on September 27.

BRC's first three grounds of protest concern the propriety of the agency's failure to award the contract after evaluation of the June 9 BAFOs and its reopening discussions. These grounds are untimely and not for

^{2/} At that time, CDI's technical proposal was the highest scored at 767 points and CDI was the lowest cost offeror at \$1,404,146, while BRC's proposal was scored at 625 points with a cost of \$1,509,968.70.

consideration since our Bid Protest Regulations require that protests based upon alleged improprieties incorporated into a solicitation must be filed not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1989). BRC was aware of the reopening of discussions on August 9, and participated in the negotiations, submitted its BAFO, and waited until after award to file its protest. See Space Applications corp., B-233143.3, Sept. 21, 1989, 89-2 CPD ¶ 255; ABC Appliance Repair Serv., B-221850, Feb. 28, 1986, 86-1 CPD ¶ 215.

In a related protest ground, BRC alleges that the agency conducted discussions with CDI between August 9 and 14, without conducting discussions with BRC. The basis for this allegation is BRC's discovery of a memo on August 14, indicating a meeting scheduled between CDI and the agency. This protest ground is also untimely and not for consideration since, under our Bid Protest Regulations, a party must file its protest within 10 working days after its basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). BRC first raised this allegation on September 27 when it filed its protest with our Office.

BRC next contends that the agency failed to apply the RFP requirement for resumes equally to it and CDI, by allowing CDI to submit a standard position description without providing the same opportunity to BRC. Despite the agency's assertion that it advised both offerors of the alternative of submitting a position description BRC denies receiving any such advice.

It is a fundamental principal of government procurement that all offerors be treated equally. Generally, where an offeror is orally informed of an agency's relaxation of requirements during negotiations, notwithstanding its absence in the solicitation, the offeror is on notice of the change. See I.E. Levick and Assocs., B-214648, Dec. 26, 1984, 84-2 CPD ¶ 695. Any such modification to a solicitation should usually be followed by a written amendment verifying the oral advice given. Id. The failure to do so can easily lead to the situation we find in this case; however, we believe the failure to advise BRC of the relaxed requirement had no measurable effect on the award decision.

BRC was evaluated on the basis of its proposed staff and received a personnel score higher than CDI. It is unlikely that by proposing a position description instead of actual personnel that BRC could have increased its score. In this regard, BRC alleges that had it known of the alternative, if only would have forgone obtaining letters of commitment. Further, even had CDI received lower scores for its position

description, its higher scores in the technical areas of corporate capabilities and overall understanding, would still have exceeded BRC's technical score. It also appears unlikely that had BRC been aware of the relaxed requirement that the impact or its cost proposal would have approached the nearly \$69,000 difference between it and CDI. Notwithstanding the use of a position description, each offeror had included the costs associated with the staff which would fill the positions covered. Thus, we do not see how the agency's alleged failure to communicate that it was permissible to use a position description had any effect on BRC's competitive standing. See Columbia Research Corp.--Request for Reconsideration, B-227802.2, Feb. 18, 1988, 88-2 CPD ¶ 164.

BRC raises a number of other grounds related to the agency's evaluation. First, BRC claims that the agency failed to adhere to the evaluation methods described in the RFP.^{3/} In particular, it objects to the agency's assignment of number scores to the subfactors of the staffing technical evaluation factor and argues that these assigned points were not rationally based because they did not account for the differences in experience among the proposed staff positions. We disagree.

While BRC is correct that the RFP states that subfactors do not have assigned points, we do not believe this prevented the agency from using a point scoring system for each staff member in order to determine the total score for the staffing factor. According to the agency, the various functions of all positions, taken from the personnel qualifications guidelines in the RFP and referenced as a subfactor, were included in a functions matrix. If a particular function related to the position being evaluated, the proposed staff member received a score of 1 to 10 points for his or her experience. These scores were added together, then divided by the number of functions attributable to the position to reach a final rating. All

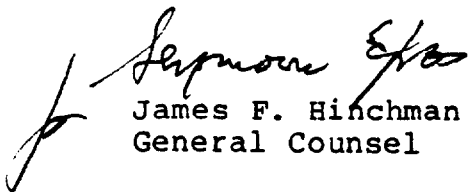
^{3/}In a related argument, BRC contends that the agency's stated "best value" award basis is inappropriate, and that a low, technically acceptable offeror basis would be better. This ground of protest was evident on the face of the solicitation and thus is untimely since it was not raised until after the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). To the extent BRC would argue that the inappropriateness only became evident during the August discussions and BAFO requests, its failure to raise this issue within 10 working days, likewise makes this ground untimely. 4 C.F.R. § 21.2(a)(2).

final ratings were added together and then divided by the number of people proposed, to produce an average final rating. This rating was then multiplied by 10 to create a percentage and multiplied by the 450 total points for this factor. Thus, it is incorrect to say that points were assigned to the subfactors. Further, it is clear that the agency's function matrix and calculations properly accounted for differences in experience among the staff. We conclude that the evaluation was a rational means of evaluating the offerors' staffs and was consistent with the stated evaluation criteria.

As further evidence of the failure to follow the evaluation methods stated in the RFP, BRC alleges that the agency failed to assign it a "cost score" as required by the RFP. Although there is no evidence of a "cost score" for either offeror, we do not find that the failure to assign a score was material or that BRC was prejudiced. Since CDI was scored higher technically and had a lower proposed cost, a cost score would not have changed the outcome of the competition.

Finally, BRC contends that the agency improperly allowed CDI to conduct a "massive hiring effort" to fill positions on the contract and that the agency solicited resumes of BRC employees for these positions. We disagree. All persons identified in the CDI proposal were present at the outset of CDI's performance of the contract and the only personnel added as staff were those represented by the position description. With regard to the hiring of former BRC employees, we have recognized that it is neither unusual or inherently improper for an awardee to recruit and hire personnel employed by an incumbent contractor. A.B. Dick Co., B-233142, Jan. 31, 1989, 89-1 CPD ¶ 106. In this regard, we do not find that the agency acted improperly in making BRC employees, who were looking for work, aware that CDI and other concerns had positions available on other contracts. In any event, where substitution of personnel is conducted in accordance with the solicitation and agency approval, it is a matter of contract administration and not within the jurisdiction of our Office. Id.

The protest is denied.


James F. Hinchman
General Counsel